

1 Aron M. Oliner (SBN: 152373)
2 Geoffrey A. Heaton (SBN: 206990)
2 **DUANE MORRIS LLP**
3 One Market Plaza
4 Spear Street Tower, Suite 2000
5 San Francisco, CA 94105-1104
6 Telephone: (415) 957-3000
7 Facsimile: (415) 957-3001
Email: gheaton@duanemorris.com

8
9 Attorneys for Plaintiff and Chapter 7 Trustee
10 E. LYNN SCHOENMANN
11

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re

Case No. 06-31144 TC

14 THE ELITE CAFÉ, INC.,

Chapter 7

15 Debtor.

16 E. LYNN SCHOENMANN, Trustee,

A.P. No.

17 Plaintiff,

COMPLAINT FOR:

18 v.

**(1) AVOIDANCE AND RECOVERY OF
FRAUDULENT TRANSFER;**

19 THOMAS CLENDENING,

**(2) RETURN OF IMPROPER
SHAREHOLDER DISTRIBUTION; AND**

20 Defendant.

(3) OBJECTION TO CLAIM

23 E. Lynn Schoenmann, Chapter 7 trustee, alleges:

24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
559
560
561
562
563
564
565
566
567
568
569
569
570
571
572
573
574
575
576
577
578
579
579
580
581
582
583
584
585
586
587
588
589
589
590
591
592
593
594
595
596
597
598
599
599
600
601
602
603
604
605
606
607
608
609
609
610
611
612
613
614
615
616
617
618
619
619
620
621
622
623
624
625
626
627
628
629
629
630
631
632
633
634
635
636
637
638
639
639
640
641
642
643
644
645
646
647
648
649
649
650
651
652
653
654
655
656
657
658
659
659
660
661
662
663
664
665
666
667
668
669
669
670
671
672
673
674
675
676
677
678
679
679
680
681
682
683
684
685
686
687
688
689
689
690
691
692
693
694
695
696
697
698
699
699
700
701
702
703
704
705
706
707
708
709
709
710
711
712
713
714
715
716
717
718
719
719
720
721
722
723
724
725
726
727
728
729
729
730
731
732
733
734
735
736
737
738
739
739
740
741
742
743
744
745
746
747
748
749
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
799
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
899
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1399
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1499
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1599
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1699
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
17

3. Venue is proper pursuant to 28 U.S.C. § 1409.

4. This adversary proceeding is a core proceeding as that term is defined at 28 U.S.C. § 157(b)(2)(A), (B), (H) and (O).

5. This Court may enter a final judgment herein, subject to review by the United States District Court under 28 U.S.C. § 158.

GENERAL ALLEGATIONS

6. On or about December 1, 2006 (the "Petition Date"), The Elite Café, Inc. ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California, San Francisco Division (the "Bankruptcy Court").

7. Plaintiff E. Lynn Schoenmann (“Trustee”), is the duly appointed, qualified and acting chapter 7 trustee of the Debtor’s bankruptcy estate.

8. The Trustee is informed and believes, and based thereon alleges, that the Debtor is a corporation organized under the laws of the State of California.

9. The Trustee is informed and believes, and based thereon alleges, that defendant Thomas Clendening (“Defendant”) is, and at all times relevant was, an individual domiciled in the State of California.

10. The Trustee is informed and believes, and based thereon alleges, that Defendant is, and at all times relevant was, the Debtor's president and a 40% shareholder of the Debtor.

11. The Trustee is informed and believes, and based thereon alleges, that Defendant is an insider of the Debtor, as that term is defined at 11 U.S.C. § 101(31).

12. The Trustee is informed and believes, and based thereon alleges, that on or about November 3, 2005, SKK Restaurant Group, LLC purchased substantially all of the Debtor's

assets for \$502,000.00 in cash and a promissory note in the amount of \$60,000.00, hereafter referred to as the “Asset Sale.”

13. The Trustee is informed and believes, and based thereon alleges, that Defendant received approximately \$203,585.06 of the cash proceeds from the Asset Sale, or such other amount as determined according to proof, hereafter referred to as the "Transfer."

**FIRST CLAIM FOR RELIEF
(Avoidance of Fraudulent Transfer)
[11 U.S.C. § 548(a)(1)(B)]**

14. The Trustee incorporates by this reference and realleges each of the foregoing paragraphs of this Complaint.

15. The Trustee is informed and believes, and based thereon alleges, that the Transfer was made within two years of the Petition Date.

16. The Trustee is informed and believes, and based thereon alleges, that Debtor did not receive reasonably equivalent value in exchange for the Transfer.

17. The Trustee is informed and believes, and based thereon alleges that:

(I) Debtor was insolvent on the date that the Transfer was made, or became insolvent as a result of the Transfer, and/or

(II) Debtor was engaged in a business or a transaction, or was about to engage in business or a transaction, for which any property remaining with Debtor was an unreasonably small capital; and/or

(III) Debtor intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as such debts matured; and/or

(IV) The Transfer was made to or for the benefit of Defendant, an insider of the Debtor, pursuant to an employment contract and not in the ordinary course of business.

18. Pursuant to 11 U.S.C. § 548, the Trustee may avoid the Transfer.

WHEREFORE, the Trustee prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
(Avoidance of Fraudulent Transfer)
[11 U.S.C. § 544; Civil Code § 3439.04(a)(2)]

19. The Trustee incorporates by this reference and realleges each of the foregoing paragraphs of this Complaint.

20. The Trustee is informed and believes, and based thereon alleges, that Debtor did not receive reasonably equivalent value in exchange for the Transfer.

21. The Trustee is informed and believes, and based thereon alleges, that at the time of the Transfer, (A) Debtor was engaged or was about to engage in a business or transaction for which the remaining assets of Debtor were unreasonably small in relation to the business or transaction, and/or (B) Debtor intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due; and as such, the Transfer is avoidable pursuant to California Civil Code § 3439.04(a)(2).

22. Pursuant to 11 U.S.C. § 544(b), the Trustee may avoid the Transfer.

WHEREFORE, the Trustee prays for judgment as hereinafter set forth.

**THIRD CLAIM FOR RELIEF
(Avoidance of Fraudulent Transfer)
[11 U.S.C. § 544; Civil Code § 3439.05]**

23. The Trustee incorporates by this reference and realleges each of the foregoing paragraphs of this Complaint.

24. The Trustee is informed and believes, and based thereon alleges, that Debtor did not receive reasonably equivalent value in exchange for the Transfer.

25. The Trustee is informed and believes, and based thereon alleges, that at the time of the Transfer, Debtor was insolvent or became insolvent as a result of the Transfer, and that the Transfer is avoidable pursuant to California Civil Code § 3439.05.

1 26. Pursuant to 11 U.S.C. § 544(b), the Trustee may avoid the Transfer.

2 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

3 **FOURTH CLAIM FOR RELIEF**
4 **(Recovery of Avoided Transfer)**
5 **[11 U.S.C. § 550]**

6 27. The Trustee incorporates by this reference and realleges each of the foregoing
7 paragraphs of this Complaint.

8 28. The Trustee may avoid the Transfer pursuant to 11 U.S.C. §§ 544(b) and 548.

9 29. Accordingly, the Trustee may recover the amount of at least \$203,585.06 from
10 Defendant, in addition to such other amounts as are established according to proof, for the benefit
11 of the Debtor's bankruptcy estate pursuant to 11 U.S.C. § 550(a).

12 **WHEREFORE**, the Trustee prays for judgment as hereinafter set forth.

13 **FIFTH CLAIM FOR RELIEF**
14 **(Return of Improper Shareholder Distribution)**
15 **[Cal. Corp. Code §§ 501, 506; 11 U.S.C. §§ 323, 541]**

16 30. The Trustee incorporates by this reference paragraphs 1 through 13 of the
17 Complaint, inclusive, as if set forth in full herein.

18 31. The Trustee is informed and believes, and based thereon alleges, that the Debtor
19 made the Transfer to Defendant as a distribution on account of Defendant's status as a
20 shareholder of the Debtor.

21 32. The Trustee is informed and believes, and based thereon alleges, that as a result of
22 the Transfer, the Debtor was, or was likely to be, unable to meet its liabilities as they matured.

23 33. The Trustee is informed and believes, and based thereon alleges, that the Transfer
24 was made in violation of California Corporations Code §§ 501 and 506.

25 34. As the representative of the Debtor's estate, the Trustee may recover the Transfer
26 pursuant to California Corporations Code § 506.

WHEREFORE, the Trustee prays for judgment as hereinafter set forth.

**SIXTH CLAIM FOR RELIEF
(Objection to Claim)
[11 U.S.C. § 502(d)]**

35. The Trustee incorporates by this reference and realleges paragraphs 1 through 29 of this Complaint, inclusive, as if set forth in full herein.

36. The Trustee is informed and believes, and based thereon alleges, that Defendant may file a proof of claim in the Debtor's bankruptcy case.

37. Each and every claim of Defendant herein should be disallowed to the extent that Defendant has not surrendered the Transfer, which is avoidable under the above claims for relief, but without limitation as to any and all other grounds of disallowance not presently known to the Trustee but that may be established according to proof.

WHEREFORE, the Trustee prays for the following relief:

PRAYER

FIRST THROUGH FOURTH CLAIMS FOR RELIEF

38. For entry of judgment avoiding the Transfer, or such other amount as established according to proof, pursuant to 11 U.S.C. §§ 544(b) and 548, and California Civil Code §§ 3439.04(a)(2) and 3439.05;

39. For judgment in the sum of at least \$203,585.06, or such other amount as established according to proof;

40. For an order directing payment thereof by Defendant to the Trustee:

FIFTH CLAIM FOR RELIEF

41. For entry of judgment directing Defendant to return the amount of the Transfer, or such other amount as determined according to proof, to the Trustee pursuant to California Corporations Code §§ 501 and 506.

42. For judgment in the sum of at least \$203,585.06, or such other amount as established according to proof;

SIXTH CLAIM FOR RELIEF

43. For entry of judgment disallowing any and all of Defendant's claim(s) herein until and unless the amount of the Transfer, together with all interest accruals thereupon, have been surrendered to the Trustee;

FOR ALL CLAIMS FOR RELIEF

44. For interest on all sums at the legal rate from the date of the Transfer;
45. For all costs of suit incurred herein; and
46. For such other and further relief as the Court deems proper.

Dated: March 21, 2007

DUANE MORRIS LLP

By: /s/ Geoffrey A. Heaton (206990)
GEOFFREY A. HEATON
Attorneys for Plaintiff and Chapter 7 Trustee
E. LYNN SCHOENMANN